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IN THE

Supreme Court of the United States

October Term, 1970

No. 70-221

THOMAS LICAVOLI,
Petitioner,

vs.

E. L. MAXWELL, Warden,
Ohio State Penitentiary,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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II. PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY VIRTUE OF PRETRIAL AND TRIAL PUBLICITY.

III. PETITIONER'S INDICTMENT WAS NOT DEFECTIVE AND INSUFFICIENT SO AS TO RENDER HIS SUBSEQUENT TRIAL VOID UNDER THE UNITED STATES CONSTITUTION.

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STATEMENT OF THE CASE

On March 8, 1934, petitioner and others specifically named were indicted by the Lucas County Grand Jury on four counts of First Degree Murder. Petitioner was tried before a jury and on November 9, 1934, said jury returned a verdict finding him guilty as charged on all four counts but recommended mercy. Consequently, petitioner was sentenced to life imprisonment in the Ohio State Penitentiary.

Petitioner appealed his conviction to the Lucas County Court of Appeals. On April 24, 1935, said Court affirmed the convictions in a lengthy opinion. Petitioner did not choose to appeal that decision as a matter of right. However, some thirty years later, he filed a motion for delayed appeal in the Ohio Supreme Court. On December 22, 1965, said Court dismissed the appeal on the basis that no substantial constitutional question existed.

Petitioner then filed a petition to vacate sentence under the Ohio post-conviction procedure in the Lucas County Court of Common Pleas. See §2953.21, et seq., Ohio Revised Code. Oral arguments were held and on June 2, 1966, the Court denied the petition. On Decem-

ber 13, 1966, the Lucas County Court of Appeals denied petitioner's motion for leave to appeal. Petitioner then appealed to the Ohio Supreme Court. On April 26, 1967, said Court dismissed the appeal on the basis that no substantial constitutional question existed. Petitioner then sought the writ of certiorari in the United States Supreme Court. On October 9, 1967, this Court denied certiorari. *Licavoli v. Ohio,* 389 U.S. 830 (1967).

Petitioner then filed a petition for the writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division. Pleadings were filed and on June 30, 1969, oral argument was held and the case submitted to the Court. The trial bill of exceptions was admitted into evidence by stipulation as were newspaper clippings relating to pretrial and trial proceedings. However, on January 28, 1970, the Court granted a motion allowing F. Lee Bailey and Gerald Alch to appear for the petitioner as co-counsel with petitioner's previous attorneys of record, Moses Krislov and Joseph Rotondo. Subsequently, on April 17, 1970, over objection of respondent, an evidentiary hearing was held. Shortly after the conclusion of the hearing, counsel for petitioner and respondent each filed a memorandum in support of oral argument.

On July 9, 1970, the District Court denied the petition for the writ of habeas corpus. An appeal then was perfected to the United States Court of Appeals, Sixth Circuit, which, after oral hearing, affirmed the judgment of the district court. It is the judgment of the Court of Appeals that the petition filed herein seeks to review.

I. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW THROUGH THE FACT THAT SOME TESTI-

MONY WAS ADDUCED DURING THE TRIAL THAT INITIALLY HAD BEEN PROMPTED BY COERCIVE MEANS WHEN THE FACTS REGARDING THE COERCION WERE BROUGHT TO THE ATTENTION OF THE JURY.

Petitioner has apparently coupled the claim of coerced testimony with an implied allegation of perjured testimony. He does so by stating the issue as follows:

"THE ADMISSION OF TESTIMONY OF WITNESSES COERCED BY STATE OFFICIALS WITHOUT REGARD FOR TRUTH DOES DENY A DEFENDANT HIS RIGHTS TO DUE PROCESS OF LAW."

(Petition page 11)

The respondent vehemently denies that there is any evidence that the prosecution used perjured testimony in this case. In addition, respondent points out that all of the witnesses themselves testified under oath that their testimony was completely truthful. Respondent admits that there was coerced testimony used but believes that under the facts of this case said testimony was clearly admissible.

Petitioner has stated that numerous witnesses were coerced into testifying and alleges, by innuendo, that their testimony was perjured. Respondent believes that with noted exceptions in regard to coercion this allegation is unfounded. Before examining the testimony of the appropriate witnesses pertaining to this allegation an uncontroverted fact must be set forth. Prior to petitioner's trial, Lucas County officials were working with two individuals from Detroit, Michigan, known as the Clarke Brothers. These individuals apparently were not brothers nor named Clarke. The record does not reflect

whether or not these men were hired by anyone in Lucas County and does not reflect their "profession." In any event, it is clear that they questioned numerous witnesses in this case and in one instance coerced testimony from a witness by force. With that admission, respondent will now review the testimony of the witnesses of whom petitioner complains.

Petitioner complains of the testimony of Helen Buder. The reason for doing so is unknown to the respondent. It is contained in the bill of exceptions, hereinafter referred to as Tr., marked Exhibit A in the district court, at pages 1343-1363. Buder was a witness to the murder of Jack Kennedy. In petitioner's trial, she positively identified "Wop" English as one of the murderers (Tr. 1344). English had been tried and found guilty prior to petitioner's trial. However, Buder did not testify in the English trial. She admitted that she had talked to the Clarke Brothers prior to the English trial but had not identified anyone (Tr. 1346). Shortly after English was convicted, she came to the prosecutor's office and stated that she recognized English as the killer of Jack Kennedy. There was absolutely no evidence that her testimony was false and absolutely no evidence that it was coerced. In answer to the question as to why she did not identify English initially, she stated:

> "Well, one thing was fear, the largest thing, fear that I would be implicated in it." (Tr. 1348)

The allegation of perjury and coercion regarding Helen Buder's testimony is totally frivolous.

Petitioner next complains of the testimony of Harry Craig (Tr. 1210-1246) and Robert Schwaite (Tr. 1246-1274). These young men witnessed the murder of Jack Kennedy and identified his killers as "Wop" English and

John Mirabella. Their presence at the scene and their testimony was corroborated by Helen Buder (Tr. 1344-1345). Petitioner complains that their testimony was adduced through coercion and monetary reward. Nothing could be further from the truth. The monetary inducement claim stems from the fact that the witnesses, Harry Craig and Robert Schwaite, received witness fees, $6.00 between them for cab fare after a session in the prosecuting attorney's office, .50 cents to make phone calls and money they lost from their jobs while they were held in protective custody during the trial of "Wop" English. This amount totaled $25.00 apiece. So, petitioner, by innuendos, indicates that these two witnesses, who at first denied they could identify the killers of Jack Kennedy, changed their testimony and perjured themselves for $28.25 each! Evidently, petitioner feels that anyone who accepts witness fees in a court of law is automatically susceptible to a possible perjury charge based on the theory of monetary inducement.

Petitioner is correct when he states that the witnesses did not identify the men, whom they later identified as the men who killed Jack Kennedy, when those same men were placed in a lineup. However, he fails to cite their reasons for not doing so. Harry Craig testified in answer to the question of why he did not identify the men at that time that "Well, I had seen them work and I didn't want to get messed (sic) with them." (Tr. 1243) Robert Schwaite testified that he did not immediately identify the men "Because I was scared to." The fact that they were scared and uncomfortable during the time they were questioned is understandable. They were two young men who witnessed a cold blooded murder from a short distance. Of course they were scared and nervous, but it wasn't because of the Clarke Brothers.

Once again, their testimony was before the jury and the jury alone could decide whether or not it was true or false. In either event, no constitutional rights of the petitioner were violated.

Next petitioner alleges that the testimony of one Ernest Reid was coerced. (Tr. 594-607) Reid identified an automobile and its occupants which allegedly was used in an attempt to murder Jack Kennedy. During the questioning of the witness before the trial, the Clarke Brothers yelled at him, accused him of being a coward and threatened him. However, the witness testified in court that he did lie concerning the identifications and that the Clarke Brothers only effect on him was that he "told the truth, but a little bit quicker." (Tr. 606) It is clear that the witness was understandably somewhat reticent to become involved in the affair and it is equally clear that petitioner's constitutional rights were not violated because of the fact that the witness told the truth "a little bit quicker." Once again, petitioner's complaint seems to revolve around the point that a witness testified as to the truth of the matter, not to the falsity of same.

Petitioner's next example of "coerced testimony" regards the witness Ed Beck (Tr. 377-390, 537-540). Beck was originally called by the prosecution and asked various questions regarding his activities at a still. Beck admitted he was employed at an illegal still but disclaimed any recollection of the names of people who worked there, who got him the job, and who paid him his wages (Tr. 377-390). Following his testimony, the witness was incarcerated in the county jail on a charge of perjury. Shortly thereafter, he was recalled by the prosecution and answered the questions propounded to him. He admitted that his initial testimony had not been true (Tr. 537-540). Petitioner's counsel, who undoubtedly

was cognizant of the fact that Beck had been held on a perjury charge, did not even cross-examine the witness. Where is the coercion? Beck was not beaten or mistreated in any manner and his jailing cannot be considered to be an act of coercion.

But even more important is Beck's later testimony. Where is the perjured part of said testimony? Petitioner does not cite same and his trial counsel did not even attempt to cross-examine the witness. If the witness perjured himself, it is clear that it took place during his initial testimony when, for all purposes, he remained silent. It is clear that Beck's uncontradicted testimony, given when he was recalled by the prosecution, was not false and did not deprive petitioner of his right to due process. In any event, his credibility was an issue for the jury.

In addition, the prosecutor clearly had grounds for holding Beck for contempt. As the district court stated in its opinion;

> ". . . There can be no doubt that the State may, and indeed has an obligation, to prefer perjury charges if it has probable cause to believe that the perjury has been committed. Beck's testimony on the second occasion he took the stand (Tr. 537-540) and the statements he made to the prosecutor prior to the date of the trial (Tr. 377-390; 537-540) establish that, from all the evidence before this Court, there was probable cause for the prosecutor to believe that Beck had committed perjury . . ."
> (p. 7 of lower court opinion)

Furthermore, the testimony Beck did eventually give was hardly harmful to petitioner. It basically consisted of Beck's acknowledgement that he worked with various people, alleged to be associated with the petitioner, at

an illegal still. The district court summarized his testimony as follows:

> "In his original testimony Beck admitted working at an illegal still but could not remember who got him the job, who paid him, or the names of other persons working at the still. When he was recalled, Beck remembered the name of his employer and co-workers. These were persons alleged by the prosecution to be associated with petitioner. In neither examination did he recall any association with Licavoli, with the exception of delivering Christmas food baskets at Licavoli's request."
> (Petition page 26)

The testimony reflecting that various individuals were "associated" with the petitioner was voluminous and it is hard to conceive how he was damaged by the fact that Beck admitted he had delivered "Christmas food baskets" to individuals at petitioner's request. Regardless of the harm, it is clear that the testimony was admissible.

Petitioner's next example of coerced testimony deals with the witness John Henry Brown. Brown was employed by petitioner as a sometimes gardener and handyman. When he was first called by the prosecution, Brown testified that on the day Jack Kennedy was killed he saw several named men in Licavoli's garage cutting up license plates (Tr. 1287). Petitioner is in error when he alleges that Brown did not testify to that fact when he was first called. Brown had previously testified before the Lucas County Grand Jury that he saw the above men putting two license plates together. However, when called in the trial of Licavoli, he claims he did not so testify, but that, if he did, it was because of threats to his wife (Tr. 1287-1288, 1292). However, Brown subsequently admitted that when he testified before the Grand

Jury, he did so freely and no threats had been made to him or his wife at that time (Tr. 1289).

After he testified before the Grand Jury, Brown left town and went to Norwalk, Akron, Detroit and Sandusky. The prosecuting attorney attempted to subpoena Brown to testify in the Licavoli trial but was unsuccessful as Brown's whereabouts were not known. Brown's wife was then questioned and informed that unless Brown returned to testify (not to testify falsely) that she would be jailed and her child put in a detention home. Brown admitted that if the prosecuting attorney had not made that threat, he would not have returned to testify (Tr. 1297). However, when he did testify, he maintained that he did not recall seeing any license plates being put together in the Licavoli garage the day Jack Kennedy was murdered. After he concluded his testimony, he was jailed on a perjury charge based upon his conflicting sworn testimony.

Subsequently, Brown was recalled by the prosecution. He again stated that he witnessed the named men cutting up license plates but still did not testify that he saw them putting the plates together. He also testified that at no time was he ever mistreated by the prosecution. In essence, his testimony was identical to what he had previously testified to. Nowhere in his testimony is there any indication that he testified falsely. Even when he was first called, he stated that all the prosecuting attorney had requested of him was that he "tell the truth, no matter what it was" (Tr. 1296, 1298). The mere fact that pressure was brought to bear upon the witness to get him to return to Toledo so he might testify did not violate petitioner's constitutional rights. In fact, the witness indicated that he did not wish to testify in the case unless the state furnished him "protection" (Tr. 1297).

It is clear he did not seek to be protected from the prosecuting attorney. In any event, the fact that pressure was brought to bear on the witnesses was a fact known by the jury and Brown's credibility was an issue for them to decide.

The obvious fact that Brown's testimony did not change when he was recalled was found to be true by the district court. That court stated:

> ". . . Brown's testimony was substantially similar on each occasion that he testified. See pp. 3-5, *supra*. Therefore, the Court holds that the allegation that perjury charges constituted coercion and a consequent denial of due process is without merit." (Petition page 30)

Although respondent believes that the testimony of Brown and the others previously referred to was admissible even if coerced, for reasons to be shown shortly, the testimony, if inadmissible, was harmless error under the criteria of *Chapman v. California,* 386 U.S. 18 (1967). Brown's testimony was damaging to the petitioner in that he stated that during the afternoon of the day Jack Kennedy was murdered he observed certain men in petitioner's garage cutting up license plates (Tr. 1287). Certain witnesses to the killing itself noted the license number of the car used in the slaying and it was stipulated at the trial the license number testified to did not exist (Tr. 1367). Previous testimony had established that the men mentioned by Brown were "members of petitioner's gang." However, other testimony concerning the Kennedy killing was far more damaging to Licavoli.

Harry Craig witnessed the killing and positively identified "Wop" English and John Mirabella as the killers (Tr. 1213-1218). The identification of two of petitioner's underlings as the murderers was obviously far more

damaging to petitioner than the testimony reflecting that certain men had been cutting up license plates in his garage prior to the killing. Craig's testimony was totally corroborated by his companion, Robert Schwaite (Tr. 1247-1252, 1265, 1271). In addition, Helen Buder witnessed the Kennedy killing and positively identified "Wop" English, whom she knew personally, as one of the killers. In addition, she testified that she saw Craig and Schwaite at the murder scene (Tr. 1344-1345). Thus, it is clear that Brown's testimony, even if erroneously admitted, was harmless error.

Finally, petitioner complains about the testimony of one Sam Stein (Tr. 1147-1177; 1234-1235). His allegation that Stein's testimony was initially induced by coercion cannot be denied. Nevertheless, under the facts of this case, his testimony was properly admitted. Stein was employed in a local pawn shop which sold a gun used in the murder of Jack Kennedy. Stein testified that he received the gun on March 17, 1933, and subsequently, between April 17 and late May, 1933, he sold the gun for $17.50 to "Firetop" Sulkin, a member of Licavoli's gang. On cross-examination, Stein admitted that this was his third different story regarding the gun. (Tr. 1162-1167). He initially told the prosecutor that he took the gun, himself, from the pawn shop and gave it to an unknown man named "Doc" for a $5.00 loan. Inasmuch as he could not show that he did not have the gun in his possession during the time Jack Kennedy was murdered, he was held on a charge of first degree murder by the prosecutor's office. He then changed his story and stated that he had given the gun to one Morris Asher for a loan of $5.00. Approximately a week after this story, Stein was questioned again by the two private investigators named "the Clarke Brothers." During the questioning of the

witness, Stein was physically beaten and ultimately stated that he had, in fact, sold the gun to "Firetop" Sulkin. He signed a deposition reflecting same. Respondent does not deny that Stein was physically beaten and, of course, does not condone such treatment. Nonetheless, the petitioner's constitutional rights were not violated by those actions. It is interesting to note that when Stein was under oath his stories never varied. His deposition and his courtroom testimony were identical. Stein admitted that his first stories were lies and that the truth of the matter was that he did sell the aforementioned gun to "Firetop" Sulkin (Tr. 1176). He stated that his testimony during Licavoli's trial was the truth (Tr. 1167-1173).

Once again, all of this information was brought out before the jury. They knew Stein's character and they knew he had been beaten prior to the time he named Sulkin as the purchaser of the murder weapon. Whether or not they chose to believe his testimony is something we will never know. However, that was their province and the petitioner's constitutional rights were not violated by the testimony.

The record proves that the physical coercion of Stein was brought to the attention of the jurors. Respondent believes that this fact, coupled with the fact that Stein testified unwaveringly that his testimony was true, enabled the jury to test its credibility. As the high court of New York stated in a unanimous decision in *People v. Portelli*, 257 N.Y. Supp. 2d 931 (1965); *cert. denied*, 382 U.S. 1019:

> ". . . On cross-examination, *Melville* stated that later the same day several detectives took him to a police station for questioning and that, although he

first denied knowing Portelli or anything about the crime, he finally told the police the story which he gave in court. But he declared that he did so only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner. However, he insisted from the witness stand that the pre-trial statement, which he made to the police, as well as his testimony, implicating Portelli was completely true.

"It is the defendants' contention that the witness' testimony should have been stricken once it appeared that his statement, although given some eight months before the trial, had been coerced by the police.

"Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a *witness* who, *although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury.* (See 3 Wigmore, Evidence [3d ed., 1940], §815, pp. 230-231.) The requirements of law are met if the fact of such earlier coercion or other official lawlessness is *disclosed to the jurors so that they may pass upon the witness' veracity and credibility* and determine whether the testimony given in open court is truthful and worthy of consideration.

"In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible

conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct." (p. 932-933)

See also *Bradford v. Michigan,* 10 Mich. App. 696 (1968); *appeal dismissed,* 381 Mich. Rep. 779 (1968); *cert. denied,* 394 U.S. 1022 (1969).

As the district court stated in its opinion:

"The question remains whether the conduct of the prosecution with respect to the *witnesses* was without regard to the truth or falsity of the testimony presented, so offensive to our concept of a fair trial as to be a denial of *petitioner's* right to due process of law. It was not. The facts surrounding the questioning of certain witnesses (particularly Brown and Stein) show that the prosecution relied upon techniques which are not consonant with the rights the Constitution accords individuals who have contact with our system of criminal justice. However, these facts do not rise to the level of a denial of *petitioner's* right to due process. The witnesses testified in an atmosphere free from physical or psychological coercion, except the demand that a witness testify truthfully. Each witness testified to the fact of previous coercion, and thus the jury had an opportunity to judge their credibility. Thus any possibility of coercion affecting the credibility of the witnesses could be judged by the jury. *See, People* v. *Portelli,* 277 N.Y. Supp. 2d 931 (1965), *cert. denied* 382 U.S. 1019 (1965); *Bradford* v. *Michigan,* 10 Mich. App. 696 (1968); *appeal dismissed,* 381 Mich. Rep. 779 (1968); *cert. denied,* 394 U.S. 1022 (1969). The jurors also were able to consider the prior inconsistent statements of a witness and contradictions in his testimony in determining credibility. In other words, the testimony produced by the prosecution was presented within the framework of judicial safeguards designed to insure the integrity

> of the fact-finding process. Therefore, the Court holds that petitioner was not deprived of due process of law with respect to the testimony of the witnesses in question." (Emphasis added) (Petition pages 30-31)

In addition, the respondent believes that even if the testimony is illegally admitted into evidence, which is not conceded, it was harmless error under the criteria of *Chapman v. California, supra.*

In view of the above, respondent believes that the testimony of all the above mentioned witnesses was clearly admissible. There is not a scintilla of evidence indicating that any of the testimony was perjured, much less known to be perjured by the prosecution. The evidence in fact is totally to the contrary. Furthermore, no confessions, coerced or voluntary, were introduced. Thus, petitioner's citations including *Pyle v. Kansas,* 317 U.S. 213 (1942), concerning the knowing use of false testimony; *United States v. Consolidated Laundry,* 291 F. 2d 563 (1961), concerning the prosecution's suppression of evidence favorable to the defense; and *Miranda v. Arizona,* 384 U.S. 136 (1966), concerning the use of coerced confessions, are not applicable to this case.

Admitting that the testimony of Stein was initially procured by coercion, the facts of the coercion was before the jury. The court having found the testimony to be admissible, the question for the jury was one of credibility and not admissibility. The only cases cited by either party support respondent's position.

II. PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY VIRTUE OF PRETRIAL AND TRIAL PUBLICITY.

In his petition petitioner sets forth some thirty headlines which, combined, he claims constituted publicity which denied him the right to a fair trial. Respondent believes that a review of such headlines disproves petitioner's contention. Many of the headlines, as indicated by petitioner, were not main headlines. Respondent believes that the headlines in question can be divided into three classes. The first class consists of headlines which occurred prior to trial and clearly were not prejudicial to petitioner. It is safe to say that stories relating to petitioner's indictment, date of trial, defense, and like matters did not tend to deprive him of his right to a fair trial. Respondent believes that in no way could they be construed to have had any possible effect on the fairness of petitioner's trial.

The second class of headlines, indeed the majority of them, deal with publicity which occurred during the trial. In this connection there never has been any proof that these headlines were seen by the jury who periodically were instructed not to read the newspapers by the trial court. Assuming *arguendo,* that some of the jurors disregarded the court's instruction and did read the newspapers, they could in no way have effected the judgment of the jury concerning petitioner's guilt or innocence. They contained information that already was known to the jury, and concerned for the most part excerpts or verbatim reports on the testimony that the jury already had heard that particular day. To imply that a reproduction of the evidence could tend to deprive one of a fair trial is ludicrous. Similarly, headlines dealing with such items as when the case would reach the jury and the report of the finding of the jury certainly cannot be considered prejudicial. Cf: *Smith v. United States,* 385 F. 2d 34 (5th Cir. 1967).

The third and final class of the headlines are headlines which the respondent believes could possibly, though speculatively, constitute an iota of prejudice against the petitioner. They read as follows:

> "Jimmy Hayes Found Sain (sic) in Detroit Area; Revenge Murder Blamed on Gang."
> (A sub headline reads: 'Licavoli Mob Blamed')
> "Hayes Murder Suspect Seized."
> (A sub headline reads, in part: 'Licavoli Gang Linked to Killing')

Of course Licavoli was not on trial for the murder of Jimmy Hayes and no reference was made to this in the trial. For that reason, respondent does not believe that any substantial prejudice could have occurred due to the two headlines. However, even if some prejudice could be assumed, it was minute in nature and in no way can it be said that same precluded petitioner from receiving a fair trial. For if any prejudice, no matter how small an amount, can be the basis of reversing a conviction then we must eliminate all trials or repeal the First Amendment to the Constitution of the United States.

The point was aptly stated by Justice Holmes in *Holt v. United States*, 218 U.S. 245, 251 when he stated:

> ". . . If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day. . . ."

Clearly, the twenty-nine headlines set forth by petitioner did not tend to deprive him of a fair trial, even if read, under the decisions of the United States Supreme Court.

But petitioner argues that the publicity also permeated the "community" with an "atmosphere of prejudice." It is interesting to note that he ascribes the

prejudice to the *community* and not the jury. Why? First of all, all of the eventual jurors swore under oath that they did not have a preconceived opinion in the case and that they would render a verdict based solely on the evidence. It is also noted with interest that petitioner did not seek a change of venue. Evidently the "fever pitch" of the community, if in fact said existed, was not of concern to him prior to the time he was convicted.

Before his trial, petitioner was aware of the newspaper stories, and he did not even make a motion for a change of venue. Had he done so, and said motion was granted, he could not argue the point on appeal. Consequently, no motion was made and now he seeks to assert the claim after he has been convicted! In fact, this particular allegation was not raised until petitioner's post-conviction appeal in the Lucas County Common Pleas Court in 1966, some 32 years after his conviction. Not only did he not seek a change of venue but it appears that he specifically desired to be tried in Lucas County, Ohio. In a letter addressed to the public by Mr. Cornell Schreiber, trial counsel for petitioner, reproduced in the Toledo Blade, on October 5, 1934, petitioner disclaimed any intention of seeking a continuance or a change of venue in his case. The letter reads as follows:

> "To the Public: I represent Thomas Licavoli. Mr. Licavoli's trial here is set for next Tuesday, Oct. 9.
> "Many inquiries have come to me as to whether a request would be made for a postponement of the trial or for the removal of the case for trial in another county.
> "Mr. Licavoli does not want the trial delayed, nor does he want the case sent to another county for trial. He does want the case to be tried in this

county on the original trial date, if it is at all possible to secure a fair trial.

"A fair trial is guaranteed by the Constitution to everyone accused of an offense, and a fair trial means that the case shall be heard by a jury that approaches its duty with an open mind, and with no preconceived ideas of guilt or innocence. A fair trial means that the case shall be heard before an impartial judge and that only legally competent evidence shall be allowed.

Appeals for Fairness

"Calm reflection should convince everyone that no man should be tried upon gossip, rumor, lurid reports, passion, prejudice, race hatred, or the numberless other considerations that have no place in an American court, and no man should be tried by word or print upon the streets. The place of trial should be in a court of justice and in no other place.

"Mr. Licavoli has been in jail awaiting trial since March 8, 1934, a period of seven months, and he respectfully asks the public only that he may be permitted to leave these months of weary waiting to appear in court for a fair trial. He asks only that the public be guided solely by the evidence as it may appear under oath and under judicial observation, and by no other influence."

This newspaper article was an exhibit in the case before the United States District Court.

Although the fact that one does not seek a change of venue is not dispositive of the prejudicial publicity claim, it has been held to be "significant proof." *Stroble v. California*, 343 U.S. 181 (1952); *United States ex rel. Darcey v. Handy*, 351 U.S. 454 (1956); *United States v. Rosenberg*, 200 F. 2d 666 (2nd Cir. 1952); *cert. denied*, 345 U.S. 1003; *Nichols v. Henderson*, 389 F. 2d 990 (6th Cir. 1968). In fact, in every major case where the United

States Supreme Court reversed a conviction on the grounds that the defendant had been denied a fair trial due to adverse publicity, a change of venue had been requested and denied. *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Rideau v. Louisiana,* 373 U.S. 723 (1963); *Irvin v. Dowd,* 366 U.S. 717 (1961). It is noted that in the *Handy* case the Court commented on the fact that the publicity issue was not raised until some three years after the conviction. In this matter, as previously noted, it was not raised until 32 years after the conviction even though the petitioner immediately appealed his conviction to the Lucas County Court of Appeals in 1934!

Nor is there any indication that petitioner exhausted his peremptory challenges in impanelling the jury. This fact, considered with the lack of a motion for a change of venue, establishes that petitioner's counsel did not believe that the pre-trial publicity would deny the petitioner his right to a fair trial. The respondent agrees. The same may be said concerning the publicity during the trial. As previously indicated, the vast majority of the publicity was basically the testimony given at the trial. In many cases it was verbatim. Surely this publicity, even if read, was not harmful to the petitioner. *Smith v. United States, supra.* Appellant, at the time of his trial, apparently agreed as a motion was never made to sequester the jury. Nor, after the trial began, was there ever a motion made for a mistrial based upon the publicity. Nor was a motion ever made to interrogate the jury to ascertain if, in fact, they had read a particular story or discussed the trial with anyone in any manner.

The trial judge continually admonished the jury not to read the newspapers or discuss the trial in any manner (Tr. 454, 598, 697, 1310, 1550 and others). It is assumed

that the jury will follow the instructions of the Court. *Epperson v. Maxwell,* #68-142 (S.D., Ohio, 1970).

Petitioner has never even alleged that the jurors disregarded the Court's instructions and read the newspaper accounts of the trial. Nor has he shown that the questioned articles were inherently prejudicial. Consequently, respondent maintains that the petitioner has not sustained the burden of proving that the newspaper publicity denied him a fair trial. *United States ex rel. Stickler v. Tehan,* 365 F. 2d 199 (6th Cir. 1966); *cert. denied,* 386 U.S. 992 (1967); *rehearing denied,* 387 U.S. 926 (1967). The allegation of possible prejudice will not sustain the burden. *Holt v. United States, supra.* He must show the alleged constitutional deprivation by a demonstrable reality and not by mere speculation. *Beck v. Washington,* 369 U.S. 541, 555-556 (1962); *United States ex rel. Darcey v. Handy, supra.* Petitioner has failed to do same.

As previously stated, petitioner at no time has produced evidence indicating that the jury ignored the trial judge's instructions and read the questioned articles. In fact, he has never even alleged that they were read. The assumption that they were read is purely conjecture and without merit. The law requires more. *Harris v. State,* 231 N.E. 2d 800 (1967). As the court stated in *Marshall v. United States,* 258 F. 2d 94, 98 (10th Cir. 1958):

> "The mere appearance of articles concerning the trial cannot compel a new trial . . . A cautionary instruction against prejudice or consideration of evidence beyond that presented in the courtroom has been held in such instances to be sufficient safeguard for defendant's rights."

See also *United States v. Accardo,* 298 F. 2d 133 (7th Cir.

1962). As the court stated in its charge to the jury (Tr. 1550):

> "... You should also keep in mind all of the instructions I have given you not to read any newspapers or permit anyone else to discuss the case in your presence ..."

It is clear that under Ohio Law, the jury is presumed, unless shown to the contrary, to have followed the judge's instructions. As was stated in *State v. Swilling*, 155 S.E. 2d 607 (1967):

> "In order to sustain defendant's position, we would not only have to assume that the jurors were cognizant of the pre-trial publicity, but would have to indulge the further presumption, without basis in fact, that they were prejudiced thereby. . . .
> "The record contains no affirmative showing of prejudice to the defendant from the newspaper publicity during the trial. It is not shown that any juror actually read the news articles in question. Assuming however that the jurors probably read the newspapers, there is a total absence of any showing of actual prejudice to the defendant therefrom . . . The newspaper articles were not such as to automatically prejudice a fair trial and, under such circumstances, prejudice will not be presumed. On the contrary, in the absence of a showing of prejudice, 'we just assume that each and every member of the jury sought honestly and impartially, under the law, to discharge his duty, and that he observed the oath required as a juror'. *State v. Williams*, 166 S.C. 63, 164 S.E. 415." (P. 612-613).

Petitioner, without any substantiating facts, implies that the jury refused to follow the trial judge's specific instructions that they pay no attention and give no weight to any matters concerning the case except that

evidence which was presented in the courtroom. If petitioner was so concerned with this alleged prejudice, why didn't he move for a change of venue or interrogate the jury, prior to their accepting the case for deliberation, concerning the aforementioned articles? In respondent's opinion, the allegation is without merit.

He next argues that the publicity "resulted in a trial conducted in a 'carnival atmosphere' in which a fair trial was denied petitioner" (Petition page 16). He then brazenly cites *Sheppard v. Maxwell, supra,* as authority. The claim can be quickly disposed of. Appellant's "carnival atmosphere" allegation is totally refuted by the record. In fact, it is a statement without any substance whatsoever. What occurred in the courtroom to establish this atmosphere? Unlike *Sheppard v. Maxwell, supra,* there were no photographers in court or radio broadcasts emanating from the courtroom. There was no fight in front of the jury between the prosecution and a witness as petitioner has previously argued. There was no motion for a mistrial because the trial was conducted in an unjudicious manner. In fact, petitioner's attorney in his closing argument stated that the case "moved along, I think, quite smoothly." (Tr. 1464). Clearly, the "carnival atmosphere" allegation is, at best, frivolous. There has undoubtedly never been a trial involving charges of multiple murder that has not been the subject of comment by the media. It is safe to say that this has been true of the press since the advent of Mr. Gutenberg's invention.

It is also clear that under the Constitution of the United States the press has a guaranteed right, with obvious limitations, i.e., *Sheppard v. Maxwell, supra;* to comment on public trials. This right has sometimes resulted in a defendant being denied his constitutional

right to a fair trial. In an effort to guarantee both parties their constitutional rights, numerous legal procedures have evolved. They include the right of a defendant to seek a change of venue. In this case, the petitioner chose not to avail himself of that right. The respondent believes that he did not do so for one reason. There was no need to seek a change of venue because he knew that he could receive a fair trial in Lucas County, Ohio. This is substantiated by the fact that the petitioner never complained about the publicity until some 32 years after his conviction, despite the fact that he did appeal his conviction to the Court of Appeals in 1935! Apparently, time has fathered the prejudicial atmosphere theory as the record clearly shows that facts did not.

In view of the above, the respondent does not believe that petitioner's allegation is meritorious. The publicity itself was not the type that would deprive a defendant of a fair trial. As the district court stated in its opinion:

> "The nature and content of these articles show that the publicity during the Licavoli trial did not approach in sensationalism, vituperativeness, intensity, or magnitude the publicity preceding the Sheppard trial. See *Sheppard v. Maxwell*, 384 U.S. 333-334 (1966). During petitioner's trial there was no carnival atmosphere in the courtroom with photographers and reporters within the rails, radio broadcasts from the courtroom, or other activities of a nonjudicial nature during and immediately preceding and following court sessions. The jurors were not treated as celebrities and continually subjected to public scrutiny.* There was no newspaper publicity questioning judicial procedure or demanding a relaxation of the requirements of due process of law. Most importantly, the case was not tried in the newspapers rather than the courtroom. See, *Sheppard v. Maxwell, supra*, at 350. Accounts of 'testi-

> mony' not presented to the jury did not appear in the newspaper, and prosecuting officials or law enforcement agents did not rebut sworn testimony through the news media. The articles appearing in the newspaper were not misleading nor calculated to stir the passions of the community to a point where a fair and impartial trial by jury could not be held." (Petition page 34) (*footnote omitted)

This, along with the petitioner's decisions not to seek a change of venue, not to seek to have a mistrial declared, not to seek to have the jury sequestered, and not to seek to have the jury interrogated regarding the publicity, destroys his belated argument of a prejudiced trial. In addition to this there is no showing, or even an allegation, that the jury disregarded the trial court's instructions and read the articles in question. Consequently, respondent believes that petitioner was not deprived of his right to a fair trial by the publicity that occurred prior to and during his trial.

III. PETITIONER'S INDICTMENT WAS NOT DEFECTIVE AND INSUFFICIENT SO AS TO RENDER HIS SUBSEQUENT TRIAL VOID UNDER THE UNITED STATES CONSTITUTION.

The indictment clearly charges the petitioner with first degree murder. In addition to the indictment, the prosecuting attorney, on the motion of petitioner's counsel, filed a Bill of Particulars prior to the trial (Tr. 1533). Inasmuch as no further action was deemed necessary by the petitioner after the Bill of Exceptions was filed, it seems obvious that he was satisfied with the specificity of the indictment. Also, inasmuch as no objection to the indictment was made, petitioner waived any complaint concerning the indictment under Ohio law. This waiver

is binding in a federal proceeding attacking the indictment. *Henry v. Mississippi,* 379 U.S. 443 (1965).

Furthermore, this claim was ruled on by the Ohio Appellate Court when petitioner appealed in 1935. That Court stated as follows:

> "An indictment charging the commission of four separate and distinct offenses of murder in the first degree is unusual, and so far as we know without precedent, but it seems to be authorized by Section 13437-3, G. C. No objection to the indictment was made and, therefore, any such defect was waived (G. C. 13437-28) but the objection was made on motion for a new trial, and it is urged here that it does not charge the defendant with murder. It is claimed that the only charge is that of conspiracy to commit murder. There is, — as will be observed, — an express allegation that the defendants conspired, which is unnecessary under the aider and abettor statute. (Section 12380, G. C.) However, there certainly can be no valid objection to expressly stating in an indictment an allegation of fact which is imported by implication of law. Had there been no such averment, the state of the trial would have been required to disclose then that it was not claimed that the defendant on trial had personally done the physical act of killing. Advising the defendant of that in the indictment was to his advantage and not to his prejudice.
>
> "It seems to us that the mere reading of the indictment is sufficient answer to the claim that it does not charge murder in the first degree. It does so charge in direct and explicit language." (pp. 2-3 of Court of Appeals Opinion contained in respondent's Appendix in court below)

This interpretation of state law is binding on the federal courts. *Jackson v. California,* 336 F. 2d 521, 524 (9th Cir. 1964); *Silva v. Cox,* 351 F. 2d 61 (10th Cir. 1965); *cert.*

denied, 383 U.S. 919; *Mounts v. Boles,* 326 F. 2d 186 (4th Cir. 1963).

Finally, it seems clear that the sufficiency of a state indictment is not cognizable in a federal action for the writ of habeas corpus. See *Via v. Perini,* 415 F. 2d 1052 (6th Cir. 1969); *Kimbro v. Bomar,* 333 F. 2d 755 (6th Cir. 1964); *Hanovich v. Sacks,* 290 F. 2d 798 (6th Cir. 1961); *United States ex rel. Tangredi v. Wallack,* 236 F. Supp. 205 (N.Y. 1964); *Affirmed,* 343 F. 2d 752 (2nd Cir. 1965); *Budd v. Rundle,* 267 F. Supp. 49 (E.D. Pa. 1967).

IV. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW DUE TO THE TOTALITY OF THE CIRCUMSTANCES EXISTING DURING THE COURSE OF HIS TRIAL INCLUDING, BUT NOT LIMITED TO, THE ABOVE ALLEGED ERRORS.

Petitioner contends that under the "totality of the circumstances" he was denied due process of law. It is a unique argument and one, to respondent's mind, that has no judicial precedent. He claims that the "totality of the circumstances" test set forth in *Gallegos v. Colorado,* 370 U.S. 49 (1962), is applicable in his case. Respondent is of the opinion that *Gallegos v. Colorado, supra,* is only applicable to questions regarding coerced confessions. The district court agreed. In any event the claim is frivolous. Petitioner argues that even if the questioned testimony of Stein, Brown, Buder and the others was admissible, and even if the pre-trial and trial publicity did not deprive him of a fair trial, and even if the indictment was correct, that one cannot dismiss the claims totally. He asserts they must be included with other non-constitutional alleged errors and then added

together. He states that although none of the separate parts can be considered constitutional error that he can still satisfy the requirement of 28 U.S.C., §2241 (c), by adding them up.

Respondent has already argued the merits of the alleged constitutional violations and will not repeat them at this point. However, respondent will examine the additional "errors" that, coupled with those previously argued, purportedly add up to petitioner being denied his constitutional right to due process of law. He makes two claims. First, he states that he was prejudiced by the fact that the trial judge and the prosecutor "were standing for election which indeed took place during the waning moments of the trial." He then adds, "This inherent evil, it is respectfully submitted, cannot be overlooked for its compelling prejudicial effect. Can it be reasonably doubted that the trial court, in its ruling on Petitioner's Motion for a Directed Verdict on November 3, 1934, was not influenced by the impending election on November 7, 1934?" (p. 21, Petitioner's Brief). Of course, there are no facts to substantiate this inference. Respondent for one can definitely state that he reasonably doubts that the overruling of the motion for a directed verdict was predicated on the upcoming election. So can anyone who wishes to read the bill of exceptions. Furthermore, why is it "inherently evil" to continue to run the courts prior to an election? Respondent knows of no decision indicating that all criminal trials should cease prior to an election because of the fact that one or more of the participants is seeking public office. To impugn the integrity of a judge with this type of innuendo, naked of facts, is ethically questionable. The claim is, charitably, a frivolous one.

Petitioner's final claim is that he was prejudiced by

a statement made by the prosecuting attorney in his closing argument. The basis for petitioner's argument is a comment by the prosecutor found on page 1520 of the Bill of Exceptions. The prosecutor stated:

> ". . . he is hidden behind alibis, hidden behind others, and here he hides behind his lawyers. (Objection, Overruled, Exception.) He doesn't take the stand to testify as he would if he were a man, he hides behind them or he hides behind the alibi when he is away. Of course he is quiet."

Petitioner argues that the statement "he hides behind his lawyers" violated his right to due process of law. The argument, though ingenious, is without substance. It is axiomatic that today the prosecution cannot comment on the fact that a defendant does not take the stand in his defense. *Griffin v. California,* 380 U.S. 609 (1965). However, that decision is not one retroactively applied. *Tehan v. Shott,* 382 U.S. 406 (1966); *rehearing denied,* 383 U.S. 931 (1966). Therefore, it seems that petitioner's argument is without merit. However, petitioner urges that the statement "he hides behind his lawyers" does not refer to the petitioner not taking the stand even though the prosecutor's next words were "He doesn't take the stand to testify as he would if he were a man. . ." Petitioner argues that the statement refers to the fact that he appeared in court with his attorneys instead of appearing alone!

Respondent cannot cite any cases to substantiate his contention that the comment obviously referred to the fact that Licavoli did not take the stand. Similarly, the petitioner cannot cite any cases reflecting that the comment referred to the fact that he appeared in court with counsel. Faced with this dilemma, respondent can only

rely on Noah Webster and Aristotle. Logically speaking, the only way petitioner could hide behind his lawyers was by abiding by their decision and not taking the stand in his defense. How else does one hide? Surely not physically. The prosecutor immediately stated, after the comment in question, "He doesn't take the stand to testify. . . ." This statement merely emphasized the statement it immediately followed. To argue that the statements are totally separate in meaning, despite the context in which they appear, is simply to ignore logic and the English language. If the prosecutor was really attempting to argue to the jury that a man must be guilty if he appeared in court with counsel, he phrased his point poorly. Certainly, he could have enunciated the contention with clarity and not in a vague fashion. A cursory review of the record would convince all that Frazier Reams had the vocabulary and the intelligence to properly phrase a sentence. The statement is not an ambiguous one if the context of the entire paragraph is studied. Clearly, the comment was in reference to Licavoli's failure to take the stand and, as such, is not germane to this action in lieu of *Tehan v. Shott, supra.*

Respondent believes that this "shot-gun" approach is a vain attempt to establish the requisite constitutional violation set forth in 28 U.S.C., §2241 (c). As the district court stated in its opinion regarding this point:

> "Therefore, the Court having reviewed the allegations in the petition and the record and having found no specific constitutional deprivation, holds that petitioner was not denied his right to a fair trial." (p. 40, Petitioner's Appendix)

Respondent urges this Court to so find.

CONCLUSION

Respondent agrees with petitioner's contention that he was entitled to due process of law. However, respondent does not believe that petitioner was denied this constitutional right in his 1934 trial. Clearly, due process of law is a constitutional right that the petitioner was entitled to in 1934. His guilt or innocence of the crimes for which he was indicted is not an issue for this Court. The question is whether or not his conviction was constitutionally obtained. In view of this controverted fact, respondent does not feel that petitioner may argue that he is partially entitled to his release because he has spent 36 years in prison. He argues:

> ". . . The Constitutional irregularities of his trial combined with the amount of time he has spent in prison and further combined with our modern concept of penal rehabilitation as opposed to penal punishment dictates the demand of justice to be that petitioner be released from custody exclusively based upon the total absence of due process of law." (p. 22 of Petitioner's Brief)

Respondent knows of absolutely no precedent for petioner's argument that past punishment is a basis for setting aside a conviction. In fact, the law is to the contrary. See 28 U.S.C.A., §2241. Therefore, respondent believes that Licavoli's comments regarding his past imprisonment should be disregarded due to the fact that past punishment, like guilt or innocence, is not a proper reason to grant or deny the writ of habeas corpus.

In conclusion, respondent submits that the testimony of Stein, Brown and the others was properly admitted into evidence. The pressures brought to bear upon them were known to the jury and consequently the question was one of credibility and not admissibility. The pre-

trial and trial publicity was not inherently prejudicial and in 1934 petitioner's counsel apparently agreed inasmuch as no change of venue was desired. In addition, most of the trial publicity was a rehash of the actual testimony and therefore could not have prejudiced the petitioner. However, it is to be presumed that the jury will follow the court's instructions not to read the newspapers and therefore the allegation is meritless without evidence to the contrary. No evidence to the contrary has been offered by petitioner. In fact, the claim has not even been alleged.

Petitioner's attack against the indictment is without merit for many reasons. The Ohio courts have upheld the indictment as conforming to Ohio law and the federal courts are bound by that interpretation. Also, inasmuch as petitioner did not object to the indictment, he has waived same. *Henry v. Mississippi, supra.* In addition, the sufficiency of a state indictment is not cognizable in a federal habeas corpus action, *Via v. Perini, supra.*

Finally, petitioner's argument that his constitutional rights were violated when the prosecutor stated that petitioner was hiding behind his lawyers is without merit. The comment clearly refers to the fact that he did not take the stand and petitioner may not complain about the comment in this action as the case that prohibited comments of that nature was not given retroactive effect. This meritless claim, coupled with the frivolous claim of prejudice resulting from the impending elections, did not deprive petitioner of his right to a fair trial under the "totality of circumstances" argument.

Respondent believes that petitioner, under the considerations of Rule 19, has shown no special or important reason for this Court to review the decision of the court below. That decision was not in conflict with

any decision of any federal court of appeals on the same matter; nor did it decide an important state question in a way to conflict with applicable state law; nor did it decide an important question of federal law which has not been, but should be, settled in this court; nor has the deciding a federal question in a way in conflict with applicable decisions of this Court.

Respectfully submitted,

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